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IN THE

SUPREME COURT OF THE UNITED STATES

No. 929 | October Term, 1944.

PAULINE E. BARRY, Administratrix of the ESTATE OF RALPH E. BARRY, deceased,
Petitioner,

vs.

READING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

No. . OCTOBER TERM, 1944.

PAULINE E. BARRY, Administratrix of the ESTATE OF RALPH E. BARRY, deceased,
Petitioner,

vs.

READING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Pauline E. Barry, Administratrix of the Estate of Ralph E. Barry, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Third Circuit rendered and entered on the 10th day of July, 1944 and which became final on the 29th day of December, 1944, in this case lately pending in said Circuit Court of Appeals, entitled Pauline E. Barry, administratrix of the Estate of Ralph E. Barry, deceased, Plaintiff-Appellant, vs. Reading Com-

pany, Defendant-Appellee, being cause No. 8583 of October Term, 1943 of civil causes on the docket of said Circuit Court of Appeals, affirming a judgment of the United States District Court for the District of New Jersey, in said cause, in favor of the respondent and against your petitioner herein.

OPINIONS OF THE COURT BELOW AND DISSENTING OPINION.

The original opinion of the United States Circuit Court of Appeals for the Third Circuit which your petitioner seeks to have reviewed appears on pages 369 and 370 of the printed transcript of the record filed herewith. The opinion of said Court upon rehearing appears on pages 381 to 383 inclusive and the dissenting opinion of Judge Biggs appears on pages 383 to 388 inclusive of the printed transcript. None of said opinions have as yet been published.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by petitioner, Pauline E. Barry, Administratrix of the Estate of Ralph E. Barry, deceased, against respondent, Reading Company on the 14th day of October, 1942 in the United States District Court for the District of New Jersey under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51; Act of April 22, 1908, c. 149 sec. 1; 35 Stat. 65 and its amendments) to recover damages for the alleged wrongful death of said Ralph E. Barry, deceased, who, while in respondent's employ as a brakeman, was run over and killed by a freight car in respondent's classification yard, leaving to survive him a widow and a minor child, this suit being for their benefit. It was conceded that both the decedent

and his employer, the defendant railroad were engaged in interstate commerce at the time of the accident. Petitioner, plaintiff in the District Court, alleged in her complaint that her action arose under the said Act and also averred that defendant had violated the provisions of the Safety Appliance Act (45 U. S. C. A. Sec. 11, 12; Act of April 14, 1910, c. 160; 36 Stat. 298) and had failed to provide the decedent with a safe place to work. Defendant's answer set up a separate defense of contributory negligence. The cause came to trial before the District Judge and a jury and in the opening counsel for the plaintiff claimed a right of recovery under the Acts referred to. A verdict was rendered in favor of the defendant which the Courts below have refused to set aside.

As appears from the evidence, Barry was riding two gondolas or "battleship cars" down the west "hump" of defendant's classification yard at Rutherford, Pennsylvania at 12:20 A M., on August 15. 1942. Preceding him was a single freight car ridden by a green brakeman, Rihm (308a, 316a) which was moving slower than Barry's cars (20a, 21a, 24a, 311a, 313a). Warnings were shouted to the riders to avoid collision (21a, 23a, 312a). The cars cars collided but did not couple (310a, 311a) and Barry's body was seen falling from his car as Rihm's car moved down the track (193a). Barry's car stopped immediately after the collision (310a) and his body was found against the rear truck about 34 feet from his brake step (31a).

The evidence upon which plaintiff relied was apparently conceded by defendant and the Court below to have made out a jury case. It was that it was the duty of Rihm to keep a look-out ahead and behind (312a) to keep the cuts a safe distance apart (25a) and to avoid collision (22a); that Rihm was looking forward (20a) and did not look back until he heard the warning shouts (22a, 309a, 312a); that he then applied his brakes to stop his car and couple Barry's car and the cars collided but did not cou-

ple (310a, 315a). When the warning was given Barry was on his brake step looking forward (20a). He was next seen falling to the ties (180a, 184a) as Rihm's car moved away (193a). Immediately after the accident another brakeman, McCleary, went up on the brake-step of Barry's car and found that the brake was on to some extent (72a); that although the ratchet wheel was equipped with an automatic or self-engaging pawl (36a, 91a, 111a) he had to kick the ratchet in order to engage the pawl and tighten the ratchet another notch (64a); that the ratchet wheel and brake staff were worn and loose (64a, 256a, 257a, 258a, 285a); and that the car had standard Pennsylvania Railroad brake equipment but a brake wheel from the Central Railroad of Georgia (99a). Evidence was given that a ratchet wheel, if efficient (251a, 281a) and secured to the brake staff would not have had to be kicked in order to engage the pawl in applying the brake (65a, 91a, 104a, 105a); that when the ratchet is loose the brake is inefficient and defective (104a, 114a, 121a) and that the brakeman would not be able to tighten the brake and retain his position on the brake step (103a); that in order to kick the ratchet he must take his foot off the step and his shoe may slip and catch under the ratchet so as to throw him off balance (105a). While being removed from under the car Barry said that his foot was caught (66a). Evidence was also given that the brake step was defective (122a) in that it was split (121a, 126a) which would cause it to ride up and down (127a); and that the particular brake wheel on this car could give only fifty percent braking power (100a, 111a).

Defendant was permitted, over plaintiff's objection, to offer testimony that Barry's car was removed from the scene of the accident and examined by car inspectors from one to eight hours thereafter (133a, 237a, 270a) without any showing that the brake was then in the same condition as at the time of the accident (137a, 186a, 215a, 223a,

237a). These witnesses did not operate the car or set it in motion and made only a "stationary" inspection of the brake (204a, 250a, 282a) and some of them had never ridden such a car down a hump (204a, 218a, 292a). They testified that at the time of their examination they found that the ratchet was loose (242a) and the brake staff worn (256a) and that there was as much as 3/16ths of an inch play between the two (252a, 256a, 257a, 259a, 284a). Over plaintiff's objections, these witnesses were permitted to testify that the brake was effective and efficient (203a, 249a, 250a, 263a, 271a, 272a) and in good operating condition (211a, 242a) and that ordinarily there was play between the shaft and the ratchet on many cars of this kind (74a, 79a). Defendant did not produce the witnesses who were present at the time of the accident (32a, 152a, 153a, 156a) nor the brakeman who released the brake in order to move the car (140a) although some of them were in the courthouse at the time of the trial (156a, 307a). In his charge, the District Judge instructed the jury that from this evidence they might find that the brake was a safe appliance (340a) without properly explaining the significance of the standards and regulations of the Interstate Commerce Commission and the absolute requirement that appliances conform thereto.

During the trial plaintiff's witness, McCleary, turned hostile and upon a plea of surprise (49a, 55a) his previously signed statement (68a) was introduced. The trial judge refused to permit inquiry as to the truth of this statement (58a, 61a, 62a) and limited the use of conflicting statements therein to the neutralization of his evidence on the witness stand (53a, 59a, 67a).

Over plaintiff's objection, the District Judge refused to submit to the jury any right of the plaintiff to recover on the ground of the common law negligence of the defendant's employees under the Federal Employer's Liability

Act and limited plaintiff's right of recovery to a finding of a violation of the Safety Appliance Act.

Prior to the charge the Trial Judge, over plaintiff's objections, consented to defendant's request No. 3 (324a, 327a), agreeing to qualify it with a charge as to the jury's right to consider the circumstantial evidence and make reasonable inferences from the testimony (327a); this he entirely omitted to do, and refused a specific request, after the charge, to charge as to the presumption arising from the death of the decedent (340a, 341a).

After verdict and judgment for the defendant on April 23, 1943, the plaintiff moved to set aside the verdict and for a new trial (346a) which was passed upon in an opinion filed by District Judge Forman and an order denying the motion was entered January 13, 1944 (350a, 358a). Plaintiff in due course appealed to the United States Circuit Court of Appeals for the Third Circuit and the cause was there presented upon oral argument and printed briefs (368a). On July 10, 1944 said Court filed an opinion, Per Curiam, affirming the judgment and stating that the record fails to disclose any reversible errors (369a). Petitioner duly filed in said Court her petition for rehearing of said cause (371) which petition was granted by said Court on November 2, 1944 (380). The cause was thereupon re-argued before the said Court *en banc* on December 8, 1944 (380). On December 29, 1944 an opinion was filed by Judge Jones on behalf of a majority of said Court confirming the former decision (381) and a dissenting opinion was filed by Judge Biggs wherein he held that the judgment of the District Court should be reversed and a new trial ordered (383).

The duly certified record is filed herewith under separate cover, together with the requisite number of printed copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28 U. S. C. A. Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Court of Appeals. The judgment of the United States Circuit Court of Appeals for the Third Circuit here sought to be reviewed was entered on July 10, 1944 (370). A petition for rehearing was duly filed by this petitioner, appellant in said Circuit Court of Appeals within the time provided by the rules of said Circuit Court of Appeals (371). The said petition was duly granted and the rehearing held (380). On December 29, 1944 the said judgment was confirmed by a majority of said Court (381), a dissenting opinion being filed by Judge Biggs (383).

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) In an action under the Federal Employers' Liability Act to recover damages for the death of a brakeman, did the court properly construe the Safety Appliance Act and the standards and regulations established thereunder when it admitted opinion evidence that an appliance which did not conform to the standards was nevertheless efficient and in good operating condition and that brakes on other cars were found in similar condition, and then instructed the jury that from such evidence they might find that the appliance was safe and could therefore exculpate the railroad?

(2) Whether reversible error was committed by the trial court in permitting the introduction, over objection,

of opinion evidence as to the efficiency and working condition of a brake at the time of an accident by witnesses who had never tested the brake in operation and who examined it hours after the car had been moved from the scene of the accident and no evidence was produced to show that the condition of the brake had remained the same?

(3) Whether reversible error was committed by the trial court holding that a previously signed statement of a witness could not become substantive evidence in the case even though the witness stated on the witness stand that its content was true?

(4) Whether by the judgment of the Circuit Court of Appeals petitioner was denied a right to which she was entitled under the Federal Employers' Liability Act, namely, the right specifically claimed by her to have the jury pass upon the evidence of defendant's general negligence independent of its violations of the Safety Appliance Act and determine whether the decedent's injury and death were due to such general negligence?

(5) Whether a trial court has committed reversible error in failing to qualify a request for charge, as it had agreed to do, and in charging that the jury should return a verdict for the defendant if it was unable to determine the cause of decedent's fall without stating that the jury might consider all the circumstances and make all reasonable inferences therefrom as to whether the fall resulted from the failure of the brake and refusing to state that the jury might also consider the presumption arising from decedent's death?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The construction of the Safety Appliance Act and the regulations of the Interstate Commerce Commission is a question of federal law and the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court: St. Joseph G. & I. Ry. Co. v. Moore, 243 U. S. 311, 37 S. Ct. 278; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 S. Ct. 616. The standards and regulations require that the ratchet wheel must be "secured" to the brake shaft and they designate a loose ratchet wheel or loose brake shaft as a defect. The testimony given by defendant's car inspectors was that these parts were worn and loose (256a, 257a, 258a, 285a) and that there was a play or looseness between the parts estimated at from 1/8 of an inch to 3/16ths of an inch (242a, 252a, 256a, 257a, 259a, 284a). Nevertheless, over the plaintiff's objection, these witnesses were permitted to testify that the brake was effective and efficient (203a, 249a, 250a, 263a, 271a, 272a) and in good operating condition (211a, 242a) without reference to the requirements of the regulations and were also permitted to testify that ordinarily there was play between these parts on many similar cars (74a, 79a). This improperly admitted testimony was the only evidence which created a question of fact as to the violation of the Safety Appliance Act by the defendant. The trial judge did not instruct the jury that the brake must conform to the regulations and that nonconformity was negligence per se but charged the jury that the regulations specified minimum dimensions only (340a) and that from this evidence they could find that the brake was a safe appliance and deny recovery (339a, 340a). In so doing the regulations were effecively nullified as is succinctly stated in the dissenting opinion of Judge Biggs of the Circuit Court of Appeals (383). In failing to find error in the trial of the cause, the majority

of the Circuit Court of Appeals has erroneously construed the Act and the regulations and has applied the doctrine of equivalents prohibited by the decisions of this Court.

(2) The only testimony presented by the defendant to prove that the brake was efficient and in compliance with the Safety Appliance Act and Interstate Commerce Commission regulations was that of its car inspectors. These witnesses did not examine or test the brake while the car was in motion (204a, 250a, 282a) and, in fact, two of them had never ridden such a car down a "hump" (204a, 218a, 292a). Their examinations were made from one to eight hours after the accident (133a, 237a, 270a) and no evidence was offered to show that the brake was in the same condition when they examined it as at the time of the accident (137a, 186a, 215a, 223a, 237a). The trial court nonetheless admitted their evidence that the brake was effective, efficient and in good working condition (203a, 211a, 242a, 249a, 250a, 263a, 271a, 272a). In determining that this did not constitute reversible error, the decision of the Circuit Court of Appeals is in conflict with the earlier decisions of that Circuit and of other Circuits which consistently have held that the test of compliance is the operating efficiency of the appliance.

(3) The judgment of the Circuit Court of Appeals in finding no reversible error in the action of the District Court is in direct conflict with the decision of the Second Circuit in the case of *Stewart v. B. & O. R. R. Co.*, 137 F 2d 527. The witness McCleary turned hostile during his examination on behalf of the plaintiff. Upon a plea of surprise, his previously signed statement was produced and identified by him. He was then asked specifically whether it was true (58a, 61a, 62a). The District Judge refused to permit the inquiry and ruled that the contents of the statement could not become substantive evidence even if

true (53a, 59a, 67a), a ruling precisely contrary to the decision in the above case.

(4) The United States Circuit Court of Appeals by its judgment affirming the judgment of the District Court denied petitioner a right specifically set up and claimed by her to which she is entitled under the Federal Employers' Liability Act, namely, the right to have the jury pass upon the evidence that the death of the decedent resulted from the general negligence of the defendant independent of its violations of the Safety Appliance Act. The complaint set up this claim (2a) and it was presented to the jury in the opening statement (14a-15a) and to the trial judge in a request for charge (343a; *cf.* 341a). From the evidence the jury might well have decided that the accident was due to the failure of Rihm to keep a lookout (22a, 309a, 312a) as required of him (22a, 312a) or the negligent cutting off of the two drafts so that they travelled too close together (21a, 22a) and collided, throwing decedent to the ground. On the motion for new trial the District Court held that this claim was waived at a pre-trial conference (351a) but it will be seen that no order was made limiting the issues under Rule #16 (1a). The defense of contributory negligence raised by the defendant (6a) and applicable only to this claim, was never withdrawn nor stricken (11a). The judgment is in conflict with the applicable decisions of this Court and the Circuit Courts holding that reliance upon violations of the Safety Appliance Act does not defeat the right to rely upon the concurrent general negligence of the railroad under the Federal Employers' Liability Act. It is a matter of prime public importance that the rights vouchsafed to railroad employees by the benign provisions of the Act be fully recognized, protected and enforced by every court in the land.

(5) Since petitioner believes that this Court will issue

its Writ for the reasons hereinbefore set forth, petitioner desires to have considered also the basic and fundamental error of the trial judge in his charge to the jury. Defendant requested a charge that a verdict for the defendant must follow if the jury was unable to determine the cause of decedent's fall (345a). The trial judge agreed to qualify this request with the direction that the jury might consider all the circumstances and make reasonable inferences (327a, 328a). This he omitted entirely from his charge and after the charge refused a specific request to instruct on the presumption arising from the death of the decedent (340a).

PRAYER.

Wherefore your petitioner prays that a writ of certiorari be issued by this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit to the end that said opinions and judgment of said Circuit Court of Appeals in said cause be reviewed by this Court, as provided by law, and that upon such review said judgment of the said Circuit Court of Appeals be reversed, and that petitioner have such other relief as this Court may deem appropriate.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURT BELOW AND DISSENTING OPINION.

The original opinion of the United States Circuit of Appeals for the Third Circuit in said cause of PAULINE E. BARRY, Administratrix of the Estate of Ralph E. Barry, Deceased, Plaintiff-Appellant vs. READING COMPANY, which petitioner here seeks to have reviewed, appears on pages 369 and 370 of the printed record filed herewith. The opinion of the majority of said Court upon rehearing, confirming the original decision, appears on pages 381 to 383 inclusive. The dissenting opinion of Judge Biggs appears on pages 383 to 388 inclusive of the printed transcript. None of said opinions have as yet been published.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari herein, and in the interest of brevity are not repeated here.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Third Circuit, in the majority opinion of said Court in this cause, erred:

(1) In deciding that there was no reversible error in the reception of evidence to the effect that an appliance was efficient although it failed to meet the definite stand-

ards of the Safety Appliance Act and regulations promulgated pursuant to it.

(2) In holding that there was no error in the admission of opinion evidence as to the efficiency of a brake by witnesses who made only a stationary inspection at times when the brake was not proved to have been in the same condition as at the time of the accident.

(3) In deciding that there was no error in holding that a prior inconsistent statement of a witness cannot become substantive evidence if he declares its truth on the witness stand.

(4) In holding that the elimination from the case of the right of recovery for general negligence did not constitute error.

(5) In holding that no error was committed in failing to qualify a request for charge as agreed.

ARGUMENT.

This is an action to recover damages for the death of a railroad brakeman employed by the defendant in interstate commerce. It is brought by virtue of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51; Act of April 22, 1908, c. 149 sec. 1; 35 Stat. 65 and its amendments). The trial in the District Court resulted in a verdict and judgment for the defendant. The petitioner-plaintiff appealed alleging that reversible error was committed by the trial court during the trial.

(1)

Misconstruction of the Standards.

Section 2 of the Safety Appliance Act (45 U. S. C. A. Sec. 11; Act of April 14, 1910, c. 160; 36 Stat. 298) provides:

"It shall be unlawful for any common carrier subject to the provisions of section 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and *efficient hand brakes;* . . ."

Pursuant to Section 3 of the Act, the Interstate Commerce Commission has promulgated standards and regulations the material portion of which are:

"It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the Act of April 14, 1910, and section four of the Act of March 2, 1893, shall be as follows:

"HANDBRAKES: . . . The brake shaft shall be not less than one and one-fourth (1¼) inches in diameter . . . Brake ratchet wheel shall be secured to brake shaft by a key or square fit, said square fit shall be not less than one and five-sixteenths (1 5/16) inches square . . ."

2 *Roberts, Federal Liability of Carriers* (2d Ed.) Appendix Q. 2010, 2011.

The Commission has also specifically described the conditions of a brake which shall be considered defects. Among these are:

"#132 *Brake shaft loose*".
"#147 *Ratchet wheel loose*".
Classification of Safety Appliance Defects; Bureau of Safety, Interstate Commerce Commission (1938).

These rules are integral parts of the Act and have

the force of law and judicial notice of them is required of all courts:

> *Lilly v. Grand Trunk W. Ry. Co.*, 317 U. S. 481, 489, 63 S. Ct. 347, 352.

And a violation of the Act or of the regulations is negligence per se

> *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 484, 36 S. Ct. 626.

Plaintiff's evidence was that the brake shaft and ratchet wheel were worn and loose. In defense of the cause, defendant offered the evidence of car inspectors who examined the brake. They testified that they found that the ratchet and shaft were loose and worn (242a, 256a, 267a, 258a, 285a) and that there was play between the parts up to 1/8th and 3/16ths of an inch (252a, 256a, 267a, 259a, 284a). Over plaintiff's objections, these witnesses were then permitted to testify that the brake was effective and efficient (203a, 249a, 250a, 263a, 271a, 272a) and in good operating condition (211a, 242a) and that ordinarily there was play between these parts on many cars of the same kind (74a, 79a). The trial judge instructed the jury that they might find from this evidence that the appliance was safe (340a) and did not instruct them as to the requirements that the parts be "*secured*". In so doing the trial judge misconstrued the standards and permitted the defendant's witnesses to substitute their opinions for the judgment of the Commission and allowed the jury to accept the former, thus completely ignoring the express decision of this Court:

> "The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do

but to ascertain the meaning of a few simple words in which the duty is described."

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 294, 28 S. Ct. 616.

To require that the parts be "secured" can mean only one thing:—that they be "made fast"; "seized and confined". The similar use of the word throughout the regulations permits no doubt of this to exist. The very antonym of "secured" is "loose" which is used in the Classification to indicate defects. Yet the witnesses were permitted to testify that loose parts were efficient and the jury were allowed to accept such testimony. The majority of the Circuit Courts of Appeals has accepted this misconstruction but it is clearly demonstrated in the dissenting opinion of Judge Biggs (383). Not only is this an erroneous construction of the regulations but defendant has thereby persuaded the Court to say that it need not comply with the law if only it will furnish an appliance which a jury may say, if permitted to do so, is just as good as the one required. This Court has firmly stated in:

St. Joseph G. & I. Ry. Co., v. Moore, 243 U. S. 311, 37 S. Ct. 278:

> "It is not admissible to allow such an important statutory requirement to be satisfied by equivalents or by anything less than literal compliance with what it prescribes." (315).

The majority opinion upon rehearing infers (382) that this question was first raised in the petition for rehearing. In fact objection was promptly made to the introduction of the inadmissible testimony when offered, and this issue was immediately raised (74a, 79a, 224a); the issue was presented to the District Court in the motion for new trial (348a, 349a) and to the Circuit Court of Appeals in the original brief (p. 35).

(2)

Admissibility of Opinion Evidence.

It is the well-settled rule of decision of the Federal Courts that the test of compliance with the standards of the Safety Appliance Act is primarily effectivess in operation:

2 Roberts' Federal Liability of Carriers (2d Ed.) 1232;
Didinger v. Pa. R. Co., 39 F. (2d) 798, 799;
Spotts v. Baltimore & Ohio R. Co., 102 F. 2d 160, 162-163 (cert. den. 307 U. S. 641, 59 S. Ct. 1039);
Chicago St. P. M. & O. Ry. Co. v. Muldowney, 130 F. 2d 971, 975 (cert. den. 317 U. S. 700, 63 S. Ct. 526).

The evidence of the car inspectors offered by the defendant was based on a stationary inspection; none of them rode the car in motion (204a, 250a, 282a) and two of them had never ridden such a car down the hump (204a, 218a, 292a). Their testimony that the brake was effective, efficient and in good operating condition (203a, 211a, 242a, 249a, 250a, 263a, 271a, 272a) was therefore totally inadmissible.

The additional fact that no evidence was presented to prove that the brake was in the same condition when examined by them as at the time of the accident is also of importance (137a, 186a, 215a, 223a, 237a). It is fundamental that the condition of an appliance some time *after* an accident, is not evidence of its condition *at the time* of the accident.

Neither the brakeman who released the brake after the accident (140a) nor any of the witnesses admittedly present at the time or immediately thereafter (32a, 152a, 153a, 156a) were produced by the defendant.

(3)

Effect of Prior Inconsistent Statements.

In the case of *Stewart v. B. & O. R. R. Co.*, 137 F 2d 527, the Circuit Court of Appeals for the Second Circuit specifically held that upon a plea of surprise a witness may be interrogated as to a prior statement and that, if he admits the truth of such statement, the facts therein contained become substantive evidence in the case and are to be treated as such.

The Circuit Court of Appeals in the instant cause refused to follow this decision when it held that there was no error in the ruling of the District Court *directly to the contrary* (53a, 58a, 59a, 61a, 62a, 67a). The facts were precisely the same as in the *Stewart* case: a hostile witness who had given a prior conflicting statement; a plea of surprise; a question as to the truth of the prior statement (58a, 59a, 61a, 62a) and a ruling that the statement could not become substantive evidence in the cause. Judge Augustus Hand speaking for the Court in that case said (page 529):

> "Inasmuch as Edman proved a hostile witness, the plaintiff was entitled to cross-examine him for purposes of impeachment and, if he had testified the affidavit was true, to use his statements in the affidavit as affirmative proof in her case".

(4)

Right to Rely Upon General Negligence.

The issues submitted to the jury in this cause were limited to the defendant's violations of the Safety Appliance Act. The trial judge failed and refused to submit to the jury the right of the plaintiff to recover under the Federal Employers' Liability Act for the general negligence of the defendant. The uncontradicted testimony

proved the negligence of Rihm in failing to keep a lookout (22a, 309a, 312a) as he was required to do (22a, 312a) and that the two drafts were running too closely together down the hump (21a, 22a). The jury should have been permitted to decide whether the subsequent collision of the cars (310a, 315a) was due to this lack of care on defendant's part and whether the accident was caused thereby.

In finding no error in the action of the District Court in failing so to do, the Circuit Court of Appeals has failed to follow the well-established rule that reliance upon Safety Appliance Act violations does not preclude concurrent reliance upon general negligence of the railroad:

> *Moore v. St. Joseph G. & I. Ry. Co.*, 186 S. W. 1035, 268 Mo. 31 (aff. 243 U. S. 311, 37 S. Ct. 278).

The duty to provide a safe place to work has been recently re-emphasized by this Court:

> *Bailey v. Central Vt. Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 1064,

and the liability arising from violation of a rule, custom or practice has been restated by the Third Circuit in:

> *Jacobs v. Reading*, 130 F. 2d 612.

The position taken by the District Court that the claim of general liability was waived by the plaintiff (351a) seems to have been abandoned by the defendant in the Circuit Court. No such waiver will be found in the record. The pre-trial conference resulted in no journal entry limiting the issues as required by *Federal Rule of Civil Procedure* #16. Instead the defendant has urged that the claim was never made at the trial.

The complaint was drawn under the Federal Employ-

ers' Liability Act (2a, 4a) and defendant set up a separate defense of contributory negligence (6a) which could have no application to the charge of Safety Appliance Act violations. This defense was never stricken or withdrawn (11a). The case under the general Act was stated to the jury (12a-15a) and the evidence sustained it. At the close of plaintiff's case this evidence was directed to the trial court's attention (130a, 131a) and was again discussed at the close of all the evidence (322a). A request for charge based *solely* on the Federal Employers' Liability Act was submitted (343a) and exception to the charge was taken for failure to include instructions under that Act (341a, 342a).

(5)

Error in the Charge.

When the defendant requested the trial judge to charge that the jury should find for the defendant if it could not determine the cause of the fall (345a), the court conceded that a qualification of the point was necessary to the effect that the jury might consider the circumstances and make reasonable inferences therefrom (327a, 328a). In the charge the qualification was entirely omitted and the request charged as originally presented (338a). In addition, at the conclusion of the charge, a specific request to charge on the presumption arising from death was refused (340a, 341a). The refusal was error in direct violation of the rulings in *Tennant v. Peoria & P. V. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, and *Worthington v. Elmer*, 207 Fed. 306, 308-209. Cases in which recovery was sustained solely upon circumstantial evidence are legion: Cf. *Bailey v. Central Vt. Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062; *Tennant v. Peoria & P. V. Ry. Co.*, supra.

Petitioner therefore prays that this Court issue a writ of certiorari herein, and that the judgment of the

United States Circuit Court of Appeals for the Third Circuit, rendered herein on July 10, 1944 and which became final on December 29, 1944 be reversed and a new trial granted.

Respectfully submitted,

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SAMUEL SHAPIRO,
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Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 929 . October Term, 1944.

PAULINE E. BARRY, Administratrix of the Estate of RALPH E. BARRY, Deceased,

Petitioner,

v.

READING COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

No. . October Term, 1944.

PAULINE E. BARRY, ADMINISTRATRIX OF THE ESTATE OF RALPH E. BARRY, DECEASED,
Petitioner,

v.

READING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

(Hereinafter the parties will be referred to as plaintiff and defendant, respectively.)

As stated in the petition filed in this cause, the plaintiff's intestate, Ralph E. Barry, while in the employ of the defendant as a brakeman, at its Rutherford yard in the State of Pennsylvania, received injuries from which he died. He fell from the head end of a draft of two cars he was riding down the west "hump" of the yard. These two cars were following a single car ridden by a brakeman named Rihm (309a, 310a). On page 3 of the petition it is stated that, "The cars collided but did not couple (310a, 311a) and Barry's body was seen falling from his car as Rihm's car moved down the track (193a)." If by this language it is meant that Barry fell from the car he was riding after it came against the car Rihm was riding, this is contrary to the evidence. The witness Baker, a switch tender in the defendant's railroad yard (179a), saw Barry "as he was landing on the ground on the ties" (184a). He said the car (obviously meaning the car which Barry was

riding) moved a car length and a half after Barry fell (184a). This witness testified that he had seen another "cut" going down No. 3 track immediately ahead of Barry's "cut". When asked by the plaintiff's counsel where "that car" was when Barry fell off, the witness answered "going down the track". When then asked how far away this other car was from Barry's cars, he answered he did not know (193a). Brakeman Rihm testified that as he was riding a car down track No. 3 he heard some one yell and turned around and saw two cars with no rider (309a, 310a). He slowed up his car and when the two cars without a rider came against it they immediately stopped (310a). He first said that when he saw the two cars without a rider following his, they were "not more than 8 car lengths away" (312a). After his recollection had been refreshed by a signed statement he had given shortly after the accident, he stated that the distance between his car and the other cars "was 3 or 4 car lengths" (221a).

There was absolutely no evidence to the effect that the cars Barry was riding collided with the car ahead before he fell off and all of the evidence on this point was to the contrary. Although on page 3 of the petition Brakeman Rihm is referred to as a "green brakeman", the evidence shows that he was employed as a brakeman at the Rutherford yard on May 1, 1942, and had worked at this yard during all the time that he was employed by the defendant (308a, 309a). The accident happened on October 14, 1942, at which time Rihm had been a brakeman for about five and one-half months.

On page 3 of the petition the following appears: "The evidence upon which plaintiff relied was apparently conceded by the defendant and the Court below to have made out a jury case. It was that it was the duty of Rihm to keep a look out ahead and behind (312a) to keep the cuts a safe distance apart (25a) and to avoid collision (22a); * * *"

This statement is absolutely misleading. It was never conceded by the Court or by the defendant that there was any question for the jury as to Rihm's conduct. At no time, by the pleadings or at the pre-trial conference or at the trial, was it suggested by the plaintiff that any negligence upon the part of Rihm was involved in the case.

It is claimed by the plaintiff that there was evidence from which the jury could have inferred that the ratchet wheel involved in this case was loose. There was an abundance of evidence from which the jury could have inferred that the ratchet wheel was not loose at all and other evidence that it was not loose enough to render the brake inefficient. Pictures of the brake were offered in evidence. Exhibits P-2, P-3, P-4, D-2, D-3, D-4.)

While the witness McCleary testified on direct examination that when he got on Barry's car after the accident he kicked the ratchet wheel so as to get the brack on another notch (64a), on cross-examination he admitted that the pawl may have engaged in the ratchet not because he kicked the ratchet but because he let up on the brake club (80a, 81a). The same witness testified on direct examination (64a) that the ratchet wheel was loose, but on cross-examination he admitted that he did not examine the ratchet wheel with his hand nor with a light (78a) and that when he got on the brake step after the accident and tried the brake it was on pretty tight and the pawl or "dog" was engaged in the ratchet wheel and was holding the brake on (82a).

The witness Conrad, foreman car inspector of the defendant (131a), examined the brake at 7:30 A. M. on the day of the accident (133a) and found no defects that would contribute to an accident (239a). The pawl and ratchet were in good operating condition. There was possibly 1/16 of an inch and positively not more than 3/16 of an inch play between the ratchet wheel and the brake rod (242a). The ratchet wheel on the car in question had a "guard" to keep it from rising, as required by Interstate Commerce

Commission regulations (242a). The brake step was equipped with split bolts to keep weather cracks from spreading. The split bolts ran through the step horizontally (247a). The brake step was tight and in good condition (248a). There was nothing about the brake wheel on this car that would make the hand brake inefficient (248a). The witness had previously been a freight brakeman and had operated cars in classification yards. In his opinion the hand brake in question was an efficient hand brake (249a).

The assistant foreman of car inspectors of the defendant examined the brake on the car from which the decedent fell, between 1:30 and 2:00 o'clock on the morning of the accident (198a, 199a). He found no defects in the brake (200a). The kind of a brake wheel on this brake would not make the brake inefficient (210a). In some brake wheels the spokes run (curve) to the right and in others to the left (211a). This witness examined the ratchet wheel and found no defects in it (211a). He applied the brake with a brake club, pushing on the brake club as hard as he could, and the pawl engaged in the ratchet wheel without his touching the wheel with his foot (213a). There was no looseness or play in the ratchet wheel (214a). The brake step was solid and firm (225a, 226a). Cracks in a brake step do not interfere with its use where split bolts are used (228a, 229a). When there was an accident in the defendant's yard it was the custom to set the cars involved aside for inspection, and not to make any repairs until after the inspection had been made (230a, 231a).

From the testimony of Arthur E. Scheellhouse, who was employed by the Pennsylvania Railroad Company as foreman car inspector (268a), it appeared that he examined the brake involved in this case on the morning of the accident at about 9:00 A. M. (269a, 270a). His testimony shows that he made a complete examination of the brake step and the hand brake (270a, 271a). There was not sufficient play between the ratchet wheel and the brake shaft to render

the brake inefficient (272a, 273a). The brake step was equipped with split bolts and the weather cracks in the step did not make it defective or unsafe (273a, 274a). On a Pennsylvania brake wheel the spokes run to the left, whereas on a Central of Georgia brake wheel they run to the right. Other railroads use brake wheels with spokes running to the right (274a, 275a). In his opinion the ratchet and pawl on the brake would have acted properly while the car was traveling down the hump (282a, 283a).

Charles N. Kittle, Division General Car Foreman of the New York Central System (285a), testified that the brake wheel on the brake involved in this case complied with the Interstate Commerce Commission regulations. He testified that this brake wheel, when placed on any car with a standard foundation, produces an efficient hand brake (290a, 291a).

John Thomas, general car inspector of the Lehigh Valley Railroad (295a), testified that the brake wheel on the brake Barry was using at the time of the accident, was a standard brake wheel for a railroad freight car (297a) and that the spokes in the brake wheels of various railroads do not all run in the same direction (297a, 298a).

It was stipulated that the accident happened on August 15, 1942, at about 12:20 A. M. (136a). After the accident the cars which Barry was riding when he was injured were put "back of the board" (140a) at about 1:00 o'clock, before any other cars were put on track No. 3 (141a). They were placed there for inspection (176a). The first inspection was made by assistant foreman of car inspectors Halbert between 1:30 and 2:30 A. M. on the day of the accident (197a, 198a). Foreman car inspector Conrad made his examination at 7:30 A. M. on the day of the accident (237a). Foreman car inspector Schellhouse, of the Pennsylvania Railroad, made his inspection about 9:00 o'clock of the same day (270a). Mr. Schellhouse arrived before Conrad had completed his inspection (240a). Mr. Mattern, defendant's foreman of car shops, was present when Schell-

house made his examination (270a). Mattern died before the trial (239a).

The trial court submitted the case to the jury, telling the jury that the plaintiff contended that the brake involved was inefficient because of the kind of a brake wheel with which it was equipped, and because there was too much play between the ratchet wheel and the brake shaft and because the brake step was split (333a). The jury was instructed that if the plaintiff's intestate met his death because the brake on the car he was riding or any of its appurtenances was defective or inefficient, the plaintiff was entitled to a verdict (336a). This was the only ground of recovery presented by the plaintiff. The jury was told that the test of an efficient hand brake is the performance of the brake when operated in the ordinary, usual and customary manner, and if the brake in this case when so operated failed to perform its function and such failure proximately contributed to the injuries and death of the plaintiff's intestate, she was entitled to a verdict (336a). The jury was also told that contributory negligence in this case neither constituted a complete defense nor diminished the damages (337a). The Court read to the jury the regulations of the Interstate Commerce Commission as to how a ratchet wheel shall be secured to a brake staff (333a). He stated that the dimensions mentioned in the regulations were minimum dimensions and that no maximum dimensions were given. He further said, "It is, after all, for you to determine whether or not the brake that was demonstrated here, when you consider the whole evidence, was a safe appliance within the meaning of the Safety Appliance Act."

On page 9 of the petition and on page 16 of plaintiff's brief it is stated that car inspectors of the defendant testified that the ratchet wheel was worn and loose. An examination of the portions of the testimony claimed by the plaintiff to support this rather unfair generalization will show that the car inspectors whose testimony is re-

ferred to said there was very little wear and not enough to impair the efficiency of the brake.

There was no evidence in the case as to what caused Barry to fall from the brake step of the car he was riding. No one saw him leave the brake step. While he was being removed from under the car he said that his foot got caught (66a). He did not say where it got caught, or whether it got caught before or after he fell from the brake step. All that can be said of this record is that there might have been some evidence of a highly unsatisfactory character from which the jury might have inferred that there was some defect in the brake, but there was absolutely no evidence that any such defect caused the plaintiff's intestate to fall from the brake step. The cause of this fall was entirely in the realm of speculation. The defendant was entitled to have a verdict directed in its favor.

The jury rendered a verdict in favor of the defendant. Plaintiff's application for a new trial was denied. An appeal was taken to the Circuit Court of Appeals and argued before three judges. These three judges unanimously affirmed the judgment in favor of the defendant. Plaintiff then applied for a reargument and the case was reargued in the Circuit Court of Appeals before five judges. This Court again affirmed the judgment in favor of the defendant by a vote of four to one, Judge Biggs dissenting and filing a dissenting opinion.

ARGUMENT.

(1).

The Trial Court Did Not Misconstrue the Safety Appliance Act or the Regulations of the Interstate Commerce Commission.

Under point (1) of his brief the attorney for the petitioner apparently contends that the trial Court should have found as a matter of law that the hand brake in question did not comply with the regulations of the Interstate Commerce Commission.

The regulations of the Interstate Commerce Commission contained in its order of March 13, 1911, prescribe, among other things, certain specifications for hand brakes. On page 2 of this order the following appears:

> "The brake-shaft shall not be less than one and one-quarter (1¼) inches in diameter, of wrought iron or steel without weld."

On page 3 the manner of attaching the ratchet-wheel to the brake-shaft is prescribed as follows:

> "The brake ratchet-wheel shall be secured to brake-shaft by a key or square fit; said square-fit shall be not less than one and five-sixteenths (1 5/16) inches square. When ratchet wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl."

It will be noted that only minimum dimensions are given for both the brake-shaft and the square fit of the ratchet-wheel. The regulations do not say that if the brake-shaft is of the minimum size the square fit must be of the minimum fixed for it. It is clear that the Interstate Commerce Commission has not undertaken to state how much space is permitted between the square portion of the brake-shaft and the square fit of the ratchet-wheel.

It is interesting by way of contrast to note the method prescribed for attaching the brake-wheel to the brake-shaft. This appears on page 3 of the Commission's order of March 13, 1911, and is as follows:

> "Brake-shaft shall be arranged with a square fit at its upper end to secure the hand-brake wheel; said square fit shall be not less than seven-eighths (7/8) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches."

In Plate A, incorporated in the above mentioned order, there is shown the tapered square fit to be used in applying a brake-wheel to a brake-shaft. Above the brake-wheel there must be a nut and a cotter pin and the cotter must either be "riveted over" or a lock nut must be used. Obviously a tapered square fit, such as prescribed for attaching the brake-wheel to the shaft, produces a tight fit, and these regulations show that the Commission when it made the order did not expect that the ratchet-wheel should be attached with as tight a fit as was prescribed for the brake-wheel.

Another provision of the regulations which shows that the Commission anticipated that there would be some play between the ratchet-wheel and the brake-shaft, is the following:

> "When ratchet-wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl."

Judge Biggs in his dissenting opinion in the Court of Appeals takes the position that under the Interstate Commerce Commission regulations, where the brake-shaft has a diameter of one and one-quarter (1¼) inches, the square fit of the ratchet-wheel must never be larger than one and five-sixteenths (1 5/16) inches. He says that when the Commission says "the square fit shall not be *less* than one and five-sixteenths (1 5/16) inches square", the Commis-

sion means that "the squart fit shall not be *more* than one and five-sixteenths (1 5/16) inches square" when the brake shaft is one and one-quarter inches in diameter. As he also says that there was uncontroverted evidence in this case that the brake shaft was designed to be one and one-quarter inches in diameter, and that the square fit of the ratchet wheel was designed to be one and five-sixteenths inches square, it follows, according to his view of the matter, that any amount of wear between the brake-shaft and the square-fit of the ratchet-wheel, which would increase the space or play between these two parts, would constitute a violation of the regulations. It is obvious that when a hand-brake of this character has been used for even a short period of time (with metal rubbing metal) there will be some wear between the square-fit of the brake shaft and the square of the ratchet wheel. According to the view of Judge Biggs, any amount of measurable wear which increases the space between the brake shaft and the square of the ratchet wheel beyond one-sixteenth of an inch would constitute a violation of the regulations of the Commission. The impracticability of this view demonstrates itself and supports our view that the Interstate Commerce Commission did not undertake to say in its regulations how much space or play is permissible between the brake shaft and the ratchet wheel. The fundamental test is whether the brake is an efficient brake. If there is so much looseness or play as to make the brake inefficient, this is a violation of the Safety Appliance Act.

In this case there was evidence as to the tightness of the fit of the ratchet wheel on the brake shaft. One witness testified that he did not find any "looseness or play" (214a). Another witness said, "I would say there was possibly 1/16 of an inch play, between 1/16 and, there wasn't 3/16, I am positive of that." (242a). Still another witness gave it as his estimate that there was somewhere between 1/16 and ⅛ of an inch space between the brake shaft and the ratchet wheel (284a). While the witness Mc-

Cleary, called by the plaintiff, testified on direct examination that the ratchet wheel was loose (64a), on cross-examination he admitted that he did not examine the ratchet wheel with his hand nor with a light (78a).

In the face of this testimony, the Court could not have found as a matter of law that the brake did not comply with the regulations of the Interstate Commerce Commission relating to the securing of the ratchet wheel to the brake shaft even if Judge Biggs' construction of the regulations were right, which, of course, we do not admit. One witness testified there was no looseness or play, and two other witnesses who examined the brake gave testimony from which it could and perhaps should be inferred that the play was as little as 1/16 of an inch. When a witness testifies that a given distance is somewhere between 1/16 and 3/16 of an inch this is hardly proof that it is more than 1/16 of an inch. All such testimony means is that the witness is unable to judge the distance more closely than that it was somewhere between 1/16 and 3/16 of an inch, or, as in the case of another witness, between 1/16 and ⅛ of an inch.

As shown above there was abundant evidence that there was not sufficient play or looseness between the brake shaft and the ratchet wheel to make the brake inefficient.

The Court submitted to the jury the question as to how much play there was between the ratchet wheel and the brake shaft, and whether or not there was so much play as to render the brake inefficient. This is certainly all, and, probably more, than the plaintiff was entitled to have done in view of the evidence.

(2).

Admissibility of Opinion Evidence.

The next point made by the plaintiff's attorney is that the trial Court committed error in admitting evidence offered by the defendant as to inspections made of the brake in question, and the opinions of expert witnesses as to its operating condition.

The plaintiff offered as an expert witness a conductor in the employ of the Pennsylvania Railroad Company (94a). This witness was employed at Morrisville, Pa. (96a) and had never seen the car in question so far as the record shows. He was asked by plaintiff's counsel and gave his opinion as to the effect of the use of a Central Railroad of Georgia brake wheel on a Pennsylvania freight car (99a) and as to ratchet wheels (100a, 101a, 104a).

The witnesses called by the defendant as experts were its foreman of car inspectors (131a), its assistant foreman of car inspectors (198a), a foreman car inspector of the Pennsylvania Railroad Company (268a), the Division General Car Foreman of the New York Central Railway Company (285a), and the General Car Inspector of the Lehigh Valley Railroad Company (295a).

The accident happened on August 15, 1942, at about 12:20 A. M. (136a). The testimony showed that the cars ridden by Barry were moved at 1:00 o'clock on that morning to a place "back of the board" (140a). They were placed there for inspection (176a). Halbert, the defendant's assistant foreman of car inspectors, made his examination of the brake between 1:30 and 2:00 o'clock on the morning of the accident (198a, 199a). Foreman Car Inspector Conrad made his examination at 7:30 o'clock on the same morning and before his examination was completed, Foreman Car Inspector Schellhouse, of the Pennsylvania Railroad, arrived to make his inspection (240a). The witnesses from the New York Central Railroad and the Lehigh Valley Railroad did not inspect the brake in question but testified as experts in response to hypothetical questions.

The testimony showed that it was the custom in the yard of the defendant, when an accident occurred, to set the cars involved in the accident aside for inspection and not to make any repairs until the inspection had been made (230a, 231a). There is, of course, no testimony that any repairs or changes were made to the car in question be-

tween the time of the accident and the time of the inspections.

The law is well settled that the admission of evidence as to inspections of property rests in the sound discretion of the trial Judge. *Reading Company v. Geary,* 47 F. 2d 142. In that case measurements made more than two years after the accident were admitted in evidence. 1 *Wigmore on Evidence* (2d Ed.) 772, is cited in this opinion. Mr. Wigmore says:

> "This general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down and has even been spoken of as a presumption. * * * That no fixed rule can be prescribed as to the time or conditions within which a prior or subsequent existence is evidential, is sufficiently illustrated by the precedents from which it is impossible (and rightly so) to draw a general rule. * * * The precedents show the principle applied to all manner of subjects:— to the condition of a highway, or of a bridge, or of a railroad track, station, or roadbed, or of a stream, or of premises, without or within, or of machinery or apparatus. * * * The matter should be left entirely to the trial court's discretion." 1 Wigmore (2d Ed.) 772, 773, 774, 775.

In *Marathon Lumber Co. v. Dennis,* 296 Fed. 471, evidence as to the condition of a "lever car" two days after the accident, was held admissible. In *O'Brien v. Las Vegas & T. R. Co.,* 242 Fed. 850, evidence of the condition of a drain cock 8 or 10 days after an accident, was held admissible. See also *Boston Excelsior v. Sweatt,* 229 Fed. 321.

It is respectfully submitted that the admission of defendant's evidence as to the condition of the hand brake in question was within the sound discretion of the trial Judge and furthermore, that the evidence was properly admitted.

The record shows beyond question that the expert wit-

nesses called by the defendant were qualified (132a, 197a, 201a, 236a, 237a, 244a, 249a, 268a, 269a, 285a, 286a, 295a, 296a). They were all foreman or assistant foreman car inspectors of various railroads. Certainly they were far better qualified than the plaintiff's expert who was a conductor.

Whether a witness offered as an expert is qualified is a question to be decided by the trial Judge in the exercise of a sound discretion.

Gila Valley, G. & N. Ry. Co. v. Lyon, 27 S. Ct. 145, 203 U. S. 465, 51 L. Ed. 276;
Congress & Empire Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487;
White v. Maryland, 106 F. 2d 392;
Grand Trunk Western R. Co. v. H. W. Nelson Co., 116 F. 2d 823.

There was no impropriety in the overruling of the plaintiff's objections to questions calling for the opinion of the defendant's experts as to the efficiency of the hand brake. Testimony of this same kind had been offered by the plaintiff through the witness Tettemer, and admitted by the Court (104a). Similar questions were asked by plaintiff's counsel of the witness McCleary and allowed (41a).

The testimony showed that the expert witnesses called by the defendant were men of broad experience in the inspection and repair of railroad freight cars and were competent to express opinions as to the efficiency of the brake.

Testimony of this kind is admissible under the New Jersey decisions. See: *Crosby v. Wells,* 73 N. J. L. 790; *Wheeler & Wilson Manufacturing Co. v. Buckhout,* 60 N. J. L. 102; *Convery v. Conger,* 53 N. J. L. 468. Numerous cases cited in the footnote to sec. 1951, Vol. 4 Wigmore on Evidence (2nd ed.) are to the same effect. See also sec. 1976.

Evidence admissible under New Jersey decisions was admissible in this case. Rule 43 (a) Federal Rules of Civil Procedure.

(3)

Effect of Prior Inconsistent Statements.

There was no error in sustaining the defendant's objection to the question to the plaintiff's witness McCleary, as to whether or not a statement signed by him for the plaintiff was true.

McCleary was called by the plaintiff as her witness (15a). The plaintiff being dissatisfied with a portion of his testimony, the witness was shown a statement which he had signed (50a). After stating that he had made the statement to Mr. Foley (an investigator for plaintiff's counsel) the witness was asked whether or not the statement was true when he made it (58a). This was objected to upon the ground that the plaintiff had no right to impeach this witness, the witness not being the kind of a witness who may be impeached by a party calling him, under rule 43 subdivision (b) of the Federal Rules of Civil Procedure. He was not a party, an officer, a director or managing agent of a corporation or of a partnership or association which is an adverse party. The plaintiff was entitled to use this statement to neutralize the testimony of the witness so far as it differed from the statement (62a) and was permitted to do so.

On this point the plaintiff relies upon the case of *Stewart v. B. & O. R. R. Co.*, 137 F. 2nd 527. In that case the Court apparently applied the New York rule and permitted a hostile witness to be cross-examined by the plaintiff for the purpose of impeachment, and after he had testified that an affidavit he had made was true, the plaintiff was permitted to use this affidavit as affirmative proof of her case. No reference is made to the Federal Rules of Civil Procedure in connection with this ruling. The opinion is silent as to whether objection was made to asking the witness whether or not the affidavit he had signed was true.

Paragraph (b) of rule 43 of the Federal Rules of Civil Procedure is as follows:

> "(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions nad contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

This rule makes a clear distinction between the witnesses who may be impeached and those who may not.

In vol. 3 of Moore's Federal Practice, p. 3075, in commenting upon rule 43 the author says:

> "The Federal practice that in general a party may not impeach his own witness is also continued, subject to the following exceptions: (1) if the witness is an adverse party (or an officer, etc., thereof) he may be impeached, and (2) rule 26 d-1 provides that 'any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.' "

The plaintiff's position cannot be sustained upon the theory that it is supported by the law of the State of New Jersey. Under the law of this State a party cannot impeach his own witness, although statements made contrary to testimony may be shown to neutralize the testimony where surprise is pleaded. *Brinkmann v. Dorsey Motors Inc.*, 121 N. J. L. 114, and cases there cited.

In the case of *Southern Rwy. Co. v. Gray*, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030, the Court said:

> "In an effort to discredit the passenger engineer, only witness to some circumstances, he was asked on cross-

examination concerning prior contradictory statements; but the exclusion of all or any part of his evidence would not change the result. *Of course, the contradictory statements can have no legal tendency to establish the truth of their subject matter.*"

Wigmore says, Vol. 2 (2d Ed.) 460:

"It is universally maintained by the courts that prior self contradictions are not to be treated as having any substantive or independent testimonial value."

(4)

Right to Rely Upon General Negligence.

The plaintiff contends that the trial Judge erroneously eliminated from the case the plaintiff's right to recover damages for negligence other than the alleged violation of the Safety Appliance Act.

The only claim pleaded in the complaint was a violation of this act.

The facts relied upon by the plaintiff are stated in the fifth paragraph of the complaint (3a). This paragraph is as follows:

"Fifth: On said date plaintiff's decedent boarded the westerly end of the lead car on the cut of the two coal cars and positioned himself on the brake platform to use the handbrake, with the aid of his brake club, for the purpose of controlling the movement of said cut of cars from the hump track to track #3. While plaintiff's decedent was so engaged in accordance with the custom, practice and rules in full force and effect at the time that said plaintiff's decedent was so employed by this defendant, by reason of the handbrake its parts and appurtenances being inefficient and defective, the plaintiff's decedent was caused to be thrown to the ground below causing plaintiff's decedent to be injured and causing his death on August 16, 1942."

The sixth paragraph (3a) merely alleges that it was the duty of the defendant to comply with the Safety Appliance Act. The seventh paragraph (3a, 4a) undertakes to tell why the hand brake was inefficient and states that "as a direct and proximate result of said defect and inefficiency as aforesaid, this plaintiff's intestate received injuries which resulted in his death." The eighth paragraph (4a) alleges that the decedent's death was caused solely by the negligence of the defendant in using a car not equipped with a safe hand brake and in that it used on its line a hand brake, its parts and appurtenances, which were inefficient and defective, and in that the defendant failed to provide the plaintiff's intestate with a safe place to work.

It is now contended by the plaintiff that because of this allegation that the defendant failed to provide the plaintiff's decedent with a safe place to work, an issue was raised as to the negligence of the fellow servants of the plaintiff's intestate in the manner in which they conducted their work of classifying cars in the defendant's yard. It is not claimed that there was anything wrong with the tracks or other structures in the yard. The plaintiff's theory is that an allegation of an unsafe place to work supports a claim of any kind of negligence in the operation of a railroad.

The case of *Louisville & N. R. Co. v. Stewart* (1940) 283 Ky. 585, 142 S. W. 2d 119, is directly in point on this question. This was an action under the Federal Employers' Liability Act, and a judgment for the plaintiff was reversed by the Court of Appeals of Kentucky because of the error of the trial Court in submitting to the jury an issue not raised by the pleadings. The Court of Appeals said:

> "Appellee's petition is rather lengthy and we therefore refrain from setting it out, but we have carefully considered it and can read out of it *only a charge of negligence upon the part of appellant in failing to provide appellee a safe place in which to work.* There is

no allegation of negligence on the part of the appellant in the movement or operation of its train or from which an inference of such would necessarily arise. It is therefore manifest that the instruction permitted recovery against appellant for negligence or failure of duty upon its part which is not charged in the petition; and the conclusion is inescapable that this is prejudicial error."

At the pre-trail hearing in this case, held under rule 16, it was agreed that the only claim of liability was that the hand brake was defective (7a, 8a, 9a, 10a). This appears from the following excerpt of the proceedings of the pre-trial conference:

"THE COURT: What about interstate commerce in the case?

MR. FUERST: That is admitted in the pleadings. *The facts are not in dispute in this case except Mr. Gildea denies the fact there was a defective brake, which is the only issue in the case.*

That, of course, was covered fully by the depositions that were taken here in Trenton some weeks ago.

THE COURT: The complaint alleges a defective hand brake.

MR. FUERST: That is right.

MR. GILDEA: That is the only issue.

THE COURT: There is nothing we can do. Was it a defective hand brake?

MR. GILDEA: Mr. Fuerst says it was and I say it was not."

In his opening statement to the jury (12a, 359, 360, 361) plaintiff's attorney read the complaint (except that he did not mention the amount sued for) and then stated to the jury that he would show that the plaintiff's intestate was injured and killed as a result of being furnished an ineffi-

cient hand brake. No other offer of proof or claim of negligence was mentioned.

At the trial the plaintiff submitted 19 requests to charge. (343a, 344a, 362, 363, 364, 365, 366, 367.) It will be noted that while several of these requests dealt with the alleged inefficiency of the hand brake and its appurtenances, not one of them dealt with any other claim of negligence. In the 10th, 11th, 12th, 16th and 17th requests the Court was asked to charge the jury that if they found that the hand brake or any of its appurtenances was inefficient and that this inefficiency proximately contributed to the death of the decedent, the plaintiff was entitled to a verdict. The Court was not asked to charge the jury that any other finding would entitle the plaintiff to a verdict.

In the 18th request to charge of the plaintiff the Court was asked to charge the jury that if they found for the plaintiff a verdict should be awarded for the full amount of damages suffered by the plaintiff and her minor daughter, as the result of the death of plaintiff's intestate. This request to charge eliminated contributory negligence from the case and, of course, contributory negligence could not have been eliminated in connection with any claim of negligence other than a violation of the Safety Appliance Act, 45 U. S. C. A. 610.

Rule 51 of the Rules of Civil Procedure requires that requests to charge be submitted in writing at the close of the evidence and that the Court inform counsel before the argument to the jury of its proposed action on the requests. In *Dallas Railway & Terminal Co. v. Sullivan,* 108 F. 2d 581, it was held that one complaining of the refusal to give a charge must be prepared to show that he requested it in writing.

The plaintiff's attorney made no request in writing dealing with any claim of negligence, other than the alleged violation of the Safety Appliance Act.

In the second oral request to charge made after the Court's charge the Court was asked to charge the jury that

"the plaintiff is entitled to be provided with a reasonably safe place to work, as provided for under the Federal Employers' Liability Act" (341a). This is not a correct statement of the law if the plaintiff referred to something other than a violation of the Safety Appliance Act. The law is that in such cases the master is obliged to exercise reasonable care to provide the workmen with a safe place to work. *Baltimore & Ohio R. R. Co. v. Robertson,* 300 Fed. 314. This general duty is not an absolute one as it is ni cases under the Safety Appliance Acts.

If an issue had been raised as to negligence upon the part of the fellow employees of plaintiff's intestate in the manner in which the work in the defendant's yard was being conducted, there was no evidence which would have justified the Court in submitting this question to the jury and it would have been error for him to do so. The uncontradicted evidence was that the plaintiff's intestate had fallen from the cars he was riding before these cars came against the car being ridden by Brakeman Rihm. Rihm testified that when he heard some one shout and turned around he saw Barry's two cars following his car and that there was no rider on these cars (309a, 310a). On cross-examination he said that when he saw these two cars following his, without a rider, they were eight car-lengths from his car or about a block and a half away (312a). On re-direct examination, after his recollection was refreshed from a statement he had made immediately after the accident, he said the cars without a rider were three or four car-lengths away when he first saw them (322a). There was no testimony contrary to that given by Rihm and there was no evidence whatever that Barry was on the two cars he was riding down the hump when they came against Rihm's cars. Rihm slowed down his car to catch Barry's cars, when he saw they had no rider (310a). While there was testimony to the effect that Rihm's car was traveling more slowly than the cars ridden by Barry (20a) the cars were eight to ten car-lengths apart when Brakeman McCleary shouted to Rihm and Barry

(23a). After shouting McCleary paid no more attention to these cars until after the accident (26a).

There was absolutely no evidence from which the jury could have found that the difference in speed between the car ridden by Rihm and the cars ridden by Barry contributed to the accident.

In an action under the Federal Employers' Liability Act for injuries sustained by a railroad employee, the employee must produce substantial evidence of negligence and cannot base his case upon mere speculation. *Brennan v. B. & O. R. Co.*, 115 Fed. 2d 555. Certiorari denied, 61 Sup. Ct. 611, 312 U. S. 685, 85 L Ed. 1123.

To recover under this act for the death of a signalman who was killed when a train collided with his inspection car, plaintiff was required to prove not only that the railroad was negligent, but that death resulted proximately from such negligence. *Deere v. Southern Pacific Co.*, 123 Fed. 2d 438. Certiorari denied, 62 Sup. Ct. 907, 315 U. S. 819, 86 L. Ed. 1216.

Persons claiming under the Federal Employers' Liability Act must adequately establish negligence and its causal connection with injury. *Atchison T. & S. F. R. Co. v. Saxon*, 52 Sup. Ct. 229, 284 U. S. 458, 76 L. Ed. 397.

It is therefore submitted that even if the question of negligence upon the part of Brakeman Rihm, or any other employee, had been presented by the pleadings and proceedings in this case, there was no evidence which would have warranted its submission to the jury.

Plaintiff's counsel now contends further that there was evidence from which the jury could have found that there was a violation of the Safety Appliance Act because the cars which Barry was riding did not couple to the car ridden by Rihm when these care came together. No such claim was made in the pleadings or at any time during the trial, and obviously was an afterthought. However, as stated above, the uncontradicted evidence showed that Barry had fallen from his cars before they came against Rihm's car.

The evidence further shows that after they came against Rihm's car, Barry's cars stopped (310a). If Barry's cars had coupled to Rihm's car, either they would have stopped the latter and all three cars would have been standing still, in which event the situation so far as Barry was concerned would have been no different, or Barry's cars would have continued with Rihm's car, in which event he would have been run over by the second car in his draft as well as the first. Obviously, the failure of the cars to couple had nothing to do with Barry's injuries.

Furthermore, it was held in *Lang v. N. Y. Central Ry. Co.*, 255 U. S. 455, 41 Sup. Ct. 381, 65 L. Ed. 729, that the coupler provisions of the Safety Appliance Act are designed only for the protection of those engaged in coupling cars. In that case a brakeman was injured when two cars, one of which had no coupler, came together. If there had been a coupler there would have been sufficient room between the ends of the cars to prevent injury. There being no intention to couple the cars, the Court held that the brakeman was not entitled to the benefits of the act.

In the present case Rihm's testimony showed that no effort was made to couple his car to the two following. When asked what he did as the cars came together he said, "I released the brake in order that they will meet without giving me too much of a bump." (310a.)

In the plaintiff's brief it is claimed that the Court deprived the plaintiff of her right to recover damages under the Federal Employers' Liability Act. This is not true. The plaintiff's case could have been submitted to the jury only under the Federal Employers' Liability Act as this act is controlling where interstate commerce is proved or admitted, as it was in this case. Where there is interstate commerce the remedy for a violation of the Safety Appliance Act is obtained under the Employers' Liability Act. Except for this act the suit could not have been brought in the United States District Court for the District of New Jersey as both parties are residents and citizens of the

State of Pennsylvania. Furthermore, except for the provisions of the Employers' Liability Act the Court could not have charged the jury that contributory negligence upon the part of the plaintiff's intestate would have no effect upon her rights. This charge is authorized only by section 7 of this act, (45 U. S. C. A. p. 610) which provides that no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to the injury or death of such employee. Contributory negligence is a complete defense to an action under the Safety Appliance Act where the employee is not engaged in interstate commerce. *Schlemmer v. B. R. & P. R. Co.*, 220 U. S. 590, 31 S. Ct. 561, 55 L Ed. 596.

It is clear that plaintiff's counsel is in error when he says that the Court eliminated the right of the plaintiff to recover under the Federal Employers' Liability Act.

(5)

Alleged Error in Charge.

The plaintiff contends that the trial Court erred in charging the defendant's third request to charge (345a) without stating in connection therewith that the jury might "consider the circumstances and make reasonable inferences therefrom." In his charge the Court did the very thing which the plaintiff's attorney says he did not do. After charging the defendant's third request in substance, the Court further told the jury that his recollection was to the effect that Barry was seen in the position where he would have been if he were manipulating the brake; that shortly thereafter Barry was found beneath the car; that if the jury found that there was a defective or inefficient brake they could take all the circumstances connected with the case into consideration in determining whether such defect or inefficiency in the brake was shown to be the proximate or a proximate contributing cause of the injury (338a, 339a). The Court clearly charged the jury on the issues

they must decide and left it to the jury to say whether the evidence showed that Barry was caused to fall from the car because of any inefficiency in the brake, the brake wheel, the fit of the ratchet wheel, or the condition of the brake step.

The circumstantial evidence was submitted to the jury and the jury was not told that they could not base a verdict for the plaintiff upon such evidence alone. Indeed, if it had been the view of the Judge that a verdict could not be founded on circumstantial evidence, he would have had to direct a verdict for the defendant in this case.

No attack is made by the plaintiff upon the defendant's third request itself. If it be necessary to cite authorities to support the language of this request, we submit the following: *N. Y. L. E. & W. R. Co. v. Estill,* 147 U. S. 581, 13 Sup. Ct. 444, 37 L. Ed. 229, and particularly Judge Thayer's charge printed as a footnote to this opinion. *Rest v. Mutual Life Ins. Co.,* 112 Fed. 769, 773; *Mayfield v. Aetna Life Ins. Co.,* 100 Fed. 2d 199, 201; *Del. & Hudson Co. v. Ketz,* 233 Fed. 31, 36; *Patton v. Texas & P. R. Co.,* 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361

It is the firmly established rule that in examining a charge to a jury to determine its correctness, the charge must be considered as a whole Taken as a whole, the charge in this case clearly set forth the issues and was comprehensive, intelligible and legally correct.

Plaintiff's attorney also contends that the trial Judge erred in declining to charge an oral request, made after the charge was delivered, to the effect that there was a presumption that the decedent was exercising reasonable care for his own safety at the time of the accident. (340a, 341a.) As there was no question in the case as to the care exercised by the decedent, this request was properly denied. At the request of the plaintiff (365) the Court had already charged the jury that contributory negligence on the part of the decedent would neither bar recovery nor diminish damages. (337a.)

CONCLUSION.

No reason appears for the granting of a writ of certiorari in this case, and the application therefor should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 929. October Term, 1944.

PAULINE E. BARRY, Administratrix of the ESTATE OF RALPH E. BARRY, deceased,
Petitioner,

vs.

READING COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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ARGUMENT.

The brief filed by counsel for the respondent goes far beyond the issues presented by the petition and brief in support thereof. Petitioner did not attempt to argue the merits of the case in this preliminary proceeding. However, the issues having now been raised, a reply in kind necessarily is indicated.

All of the criticisms made of the petitioner's Statement of the Case are based upon a view of the evidence that is entirely one-sided. The facts concerning the general negligence of the respondent as we stated them therein are those which the jury may well have found had the issues been properly presented to them by the trial court. On the other hand, the evidence of respondent's witnesses as to the efficiency of the brake was entirely inadmissible and should never have been submitted to the jury. Nowhere has petitioner sought to give the impression that a properly instructed jury was **required** to accept petitioner's evidence or the inferences therefrom drawn by her counsel. In stating the conflicts in the evidence on the issues presented in the petition, respondent has made it even more apparent that these issues are such as should move this Court to grant certiorari and to consider whether or not this employe's widow and her child have not been denied their constitutional right to a fair trial on every issue presented by the evidence.

(1)

Respondent states its position on this point in the language of the majority opinion of the Circuit Court of Appeals (382-383). No better answer could be conceived than the clear and simple language of the dissenting opinion of Judge Biggs (384-387). The great importance of an

authoritative decision construing this Order of the Commission is made apparent by this diversity of opinion.

In all of its argument as to the required dimensions of the brake-shaft and ratchet-wheel, respondent has completely ignored the **basic** requirement of the Order: that the ratchet-wheel be "secured." A hand brake is not "efficient" under the Act unless the ratchet-wheel **is secured** to the brake-shaft. Although the obvious meaning of the word "secured" is easily ascertained, it is not necessary to go beyond this very Order to find the intent of the Commission in using the term. The same Order uses it in four other places: "to secure the hand brake wheel"; "secured to brake shaft drum"; and "secured by riveting" in two places. And the terms "securely supported" and "securely fastened" are used no less than eleven times in the following standards. Here are three methods of "securing" appliances provided for in a single Order: by a square fit, by riveting, and by a key. Is it conceivable that the result to be accomplished is different in any one method of "securing" than in any other? Certainly the effect of riveting or use of a key is to make the two parts operate as a single unit, without looseness or play. Equally true it must be that in using a square fit the application must be such that the same result is obtained. The minimum relative dimensions of one and one-fourth (1¼) inches **in diameter** for the brake shaft and one and five-sixteenths (1 5/16) inches **square** for the ratchet-wheel can leave a space of **only one-thirty-second (1/32) of an inch on each side** of the shaft so that the two parts will operate as a unit—be "secured". When the play between them increases beyond this dimension—up to **three-sixteenths (3/16) of an inch** as in the instant case—or when the parts are not "secure" but are "loose" as described by the witnesses, there can be no doubt that a violation of the Act and the Regulations exists and should be recognized by the Court.

Respondent entirely overlooks the fact that the Commis-

sion has specifically declared that "brake shaft loose" or "ratchet wheel loose" are defects which render the hand brake inefficient. At no time during the trial was the jury instructed or permitted to know that the brake had to conform to these regulations and that, if it did not, a violation of the Act existed.

On the contrary, the instructions of the Court were entirely misleading: they interpreted the Order of the Commission as requiring only compliance with **minimum** dimensions; and they permitted the jury to find that the brake was safe and efficient even though its parts were loose in direct violation of the defect classification.

(2)

Respondent has made no attempt to justify the admission of the testimony here in question. It ignores the primary distinction between the testimony of plaintiff's expert and that of defendant's car inspectors. Witness Tettemer was asked by plaintiff to express his opinion **solely** upon facts already proved and admitted in the record. Defendant's inspectors, on the contrary, were permitted to give testimony based upon no admissible evidence and in the face of admissions by the first inspector to see the car that he **did not know** whether it was in the same condition as at the time of the accident (215a-216a, 223a).

The authorities cited certainly do not support any theory that secondary and speculative evidence may be admitted in the unreviewable discretion of the Trial Judge while the party offering it is clearly shown to be suppressing the primary and available evidence in the case. If the issue is in fact one of discretion, we do not hesitate to say that the admission of this evidence amounted to a clear abuse of it.

In its quotation from Dean Wigmore, respondent has

omitted a pertinent sentence. We quote from the last edition of his work:

> "They may be roughly grouped into two classes,—those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal), and those in which such preliminary showing is required. Whether it should be required must depend entirely on the case in hand, and it is useless to look or to wish for any detailed rules."
>
> II *Wigmore on Evidence*, Sec. 437, p. 414.

In the case of *Marathon Lumber Co. v. Dennis*, 296 F 471, cited, it was the plaintiff who was permitted to show the subsequent existence of a defect in an axle which remained in the **possession of the defendant.** The same is true of the draincock in *O'Brien v. Las Vegas & T. R. Co.*, 242 F. 850 and *Boston Excelsior Co. v. Sweatt*, 229 F. 321, cited. In none of the numerous cases cited by Wigmore will it be found that without prior proof of similarity of conditions, proof of subsequent condition of an appliance capable of being dismantled in a few minutes (215-216a) has been admitted.

(3)

It is difficult to conceive that Respondent had read the case of *Stewart v. B. & O. R. R. Co.*, 137 F 2d 527, before writing its brief. Judge Hand specifically states (529):

> "It . . . excluded his affidavit (Exhibit A) in spite of the fact that Edman testified the affidavit was true and though it contained evidence somewhat inconsistent with his other testimony."

The exclusion of the testimony was one of the grounds for **reversal** of the court below. The opinion does cite two decisions of the New York Courts but it also relies upon

United States v. Freundlich, 95 F 2d 376, 379.

The Federal rule is not at variance with the cited case:

United States v. Lonardo, 67 F 2d 883;
London Guarantee Co. v. Woelfle, 83 F 2d 325.

Respondent's quotation from Dean Wigmore ignores the more progressive rule which he discusses at length in the third edition of his work.

III *Wigmore on Evidence* (3rd Ed.) Sec. 1018, p. 687:

> "It does not follow, however, that Prior Self-contradictions, when admitted, are to be treated as having no **affirmative testimonial** value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay rule. . . . The whole purpose of the Hearsay rule has already been satisfied."

Even the general rule, that prior contradictory statements, the truth of which is denied or not affirmed, may be used only for impeaching purposes has received responsible criticism and has been strictly limited, so that some affirmative weight may be given them, if the witness is subject to cross-examination:

Di Carlo v. United States, 6 F. 2d 364 (CCA-2), certiorari denied, 268 U. S. 706;
Curtis v. United States, 67 F. 2d 943, 945, 946 (CCA-10);
United States v. Block, 88 F. 2d 618, 620 (CCA-2);
Chicago, St. P. & C. Ry. Co. v. Kulp, 102 F. 2d 352, 358 (CCA-8) certiorari denied 307 U. S. 636.

Argument

It is an established principle that where a witness called by a party testifies adversely, he may be impeached by contradictory statements to overcome the effect of his adverse testimony, and if he does not admit the truth of the contradictory statements, the party has the right to introduce other evidence to show that the facts are otherwise than as testified to by the witness: (*Hickory v. United States,* 151 U. S. 303, 309.) It is submitted that, by the same principle, there can be no evidence of greater weight than the prior signed statement of the witness himself, when he admits truth of the contradictory statements, that the facts are otherwise than as he has testified.

It is an elementary rule of evidence that where a witness gives self-contradictory testimony, the trier of the facts may accept whichever of the contradictory versions he believes to be true.

Craig v. United States, 81 F. 2d 816 (CCA-9), certiorari denied 298 U. S. 690;
Ryan v. United States, 99 F. 2d 864 (CCA-8), certiorari denied 306 U. S. 635.

In *Craig v. United States,* 81 F. 2d 816, the court said (p. 828):

> "The mere fact, however, that a witness' testimony is self-contradictory does not prevent its constituting substantial evidence."

There is no difference in principle between the situation where the witness gives contradictory testimony while testifying, either on direct examination or on cross-examination, and the situation here presented where the witness being examined under oath as to the truth of the prior statements, in effect, gives self-contradictory testimony by affirming the truth of the prior statements. In both situations the contradictory statements constitute affirmative, substantive and substantial evidence.

No. 929

INTERSTATE COMMERCE COMMISSION
BUREAU OF SAFETY

CLASSIFICATION OF SAFETY APPLIANCE DEFECTS

July 1, 1925

INTERSTATE COMMERCE COMMISSION

BUREAU OF SAFETY

CLASSIFICATION OF SAFETY APPLIANCE DEFECTS

July 1, 1935

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1935

For sale by the Superintendent of Documents, Washington, D. C.
Price 5 cents

REFERENCE LETTERS

(*A*) Considered as defects only when contour lines allow lost motion sufficient to approach the danger point as shown by standard worn coupler limit gage.

(*B*) In determining defects of this class car must be standing on approximately level track when measurements are taken. State height.

(*C*) Describe defects.

(*D*) Considered as defects only when unsafe or inoperative.

CLASSIFICATION OF SAFETY APPLIANCE DEFECTS

COUPLER

(State name and type of coupler.)

1. Coupler body broken.
2. Coupler body missing.
3. Coupler out of contour (*A*)
4. Coupler too high. (*B*)
5. Coupler too low. (*B*)
6. Carrier iron defective. (*C*)
7. Draft gear or attachments defective. (*C*)
8. Excessive free slack in draft gear. (More than 1½ inches.) (*C*)

KNUCKLE

9. Knuckle broken.
10. Knuckle missing.
11. Knuckle worn. (*A*)
12. Knuckle wrong. (*D*)
13. Knuckle pin bent.
14. Knuckle pin broken.
15. Knuckle pin missing.
16. Knuckle pin worn. (*A*)
17. Knuckle thrower missing, defective or inoperative. (*C*)

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LOCK BLOCK

18. Lock block bent.
19. Lock block broken.
20. Lock block missing.
21. Lock block worn. (*A*)
22. Lock block disconnected.
23. Lock block wrong. (*D*)
24. Lock block inoperative.
25. Lock block key missing.
26. Lock block trigger missing.
27. Lock set missing.
28. Lock lift defective or inoperative. (*C*)
29. Lock lift missing.
30. Lock lift wrong or incorrectly applied. (*C*–*D*.)

UNCOUPLING MECHANISM

(State name of patented uncoupling mechanism found defective.)

31. Uncoupling lever bent. (*D*)
32. Uncoupling lever broken.
33. Uncoupling lever missing.
34. Uncoupling lever wrong or incorrectly applied. (*C*)
    (Includes uncoupling levers too long, too short, or otherwise of wrong dimensions, or not having the required clearance around handle.)
35. Uncoupling lever disconnected.
    (This refers to uncoupling levers consisting of two or more sections.)
36. Uncoupling lever inoperative.

37. *Uncoupling lever handle too low.
38. *Uncoupling lever stop broken, loose or incorrectly applied. (*C*)
39. *Uncoupling lever stop missing.
40. Uncoupling chain or other connecting device broken or disconnected. (*C*)
41. Uncoupling chain or other connecting device missing.
42. Uncoupling chain or other connecting device kinked.
43. Uncoupling chain or other connecting device too long.
44. Uncoupling chain or other connecting device too short.

END LOCK

(Refers to bracket or casting supporting outer end of uncoupling lever.)

45. End lock or casting bent.
46. End lock or casting broken.
47. End lock or casting loose. (*D*)
48. End lock or casting missing.
49. End lock or casting wrong. (*D*)

KEEPER

(Refers to bracket or casting supporting inner end of uncoupling lever.)

50. Keeper bent.

* Defects 37, 38, and 39 apply only to levers of the rocking or push down type.

51. Keeper broken.
52. Keeper loose. (*D*)
53. Keeper missing.
54. Keeper wrong. (*D*)

VISIBLE PARTS OF AIR BRAKE

55. Air brake cut out.
56. Cylinder and triple valve not cleaned within required period. State type of equipment and date of last cleaning.
57. Cylinder and triple cleaned; no date.
58. Air hose missing.
59. Air hose defective. (*C*)
60. Angle cock missing.
61. Angle cock defective. (*C*)
62. Angle cock handle broken.
63. Angle cock handle missing.
64. Brake pipe broken.
65. Brake pipe loose.
66. Angle cock bracket defective.
67. Conducting pipe defective.
    (Refers to connection between brake cylinder and reservoir.)
68. Branch pipe defective.
    (Refers to the connection between brake pipe and triple valve.)
69. Cut-out cock defective. (*C*)
70. Cut-out cock missing.
71. Cylinder casting defective.
72. Cylinder loose or missing. (*C*)

73. Reservoir casting defective.
74. Reservoir loose or missing. (*C*)
75. Triple valve defective. (*C*)
76. Triple valve missing.
77. Release valve defective. (*C*)
78. Release valve missing.
79. Release rod defective. (*C*)
80. Release rod missing.
81. Release rod disconnected.
82. Retaining valve defective or insecurely fastened. (*C*)
83. Retaining valve missing or incorrectly applied. (*C.*)
84. Retaining pipe defective.
85. Retaining pipe missing.
86. Piston travel excessive.
    (Considered as defect when travel exceeds 10 inches.)
87. Push rod defective. (*C*)
88. Push rod missing.
89. Air brake inoperative.

HANDHOLD

(State location.)

90. Handhold bent.
91. Handhold broken.
92. Handhold loose.
93. Handhold missing.
94. Handhold wrong dimensions. (*C*)
95. Handhold not having proper clear length or clearance. (*C*)
96. Handhold incorrectly located or applied. (*C*)

HANDRAIL

(State location.)

97 Handrail bent or not having proper clearance. (*C–D*)
98. Handrail broken.
99. Handrail loose.
100. Handrail missing.
101. Handrail wrong dimensions. (*C*)
102. Handrail incorrectly located or applied. (*C*)

LADDER

(State location.)

103. Ladder tread bent.
104. Ladder tread broken.
105. Ladder tread loose.
106. Ladder tread missing.
107. Ladder tread without foot-guard.
108. Ladder tread not having proper clear length or clearance. (*C*)
109. Ladder treads incorrectly spaced.
110. Ladder stile bent.
111. Ladder stile broken.
112. Ladder stile loose.
113. Ladder missing or loose. (*C*)
114. Ladder incorrectly applied. (*C*)
115. Ladder incorrectly located. (*C*)
116. End ladder clearance inadequate. (*C*)

RUNNING BOARD

(Includes both longitudinal and latitudinal running boards. State location of defect.)

117. Running board broken, or decayed. (*C*) (*D*)
118. Running board loose.
119. Running board missing.
120. Running board wrong dimensions. (*C*)
121. Running board not properly secured to car. (*C*)
122. Running board brace broken.
123. Running board brace loose.
124. Running board brace missing.
125. Running board cleat broken.
126. Running board cleat loose.
127. Running board cleat missing.
128. Running board obstructed. (*C*)
129. Running board saddle block missing or defective (*C*)

BRAKE SHAFT

130. Brake shaft bent. (*D*)
131. Brake shaft broken.
132. Brake shaft loose.
133. Brake shaft missing.
134. Brake shaft wrong dimensions. (*C*)
135. Brake shaft welded.
136. Brake shaft incorrectly applied. (*C*)
137. Brake shaft top nut missing or insecure. (*C*)
138. Brake shaft not properly secured to prevent being raised out of operating position. (*C*)

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BRAKE WHEEL

139. Brake wheel with insufficient clearance. (*C*)

NOTE.—This applies both to (a) clearance around rim of brake wheel, and to (b) the distance from outside edge of brake wheel to a vertical plane parallel with end of car passing through inside face of knuckle when closed with coupler horn against buffer block or endsill.

140. Brake wheel bent. (*D*)
141. Brake wheel broken.
142. Brake wheel loose.
143. Brake wheel missing.
144. Brake wheel incorrectly applied.
145. Brake wheel wrong dimensions.

RATCHET WHEEL

146. Ratchet wheel broken.
147. Ratchet wheel loose.
148. Ratchet wheel missing.
149. Ratchet wheel incorrectly applied.
150. Ratchet wheel wrong dimensions or insufficient number of teeth. (*C*)

BRAKE PAWL

151. Brake pawl broken.
152. Brake pawl loose.
153. Brake pawl missing.
154. Brake pawl inoperative. (*C*)
155. Brake pawl incorrectly applied. (*C*)

BRAKE STEP

156. Brake step bent or broken. (*C-D*)

157. Brake step loose.
158. Brake step missing.
159. Brake step incorrectly applied. (*C*)
160. Brake step wrong dimensions. (*C*)
161. Brake step brace bent. (*D*)
162. Brake step brace broken.
163. Brake step brace loose.
164. Brake step brace missing.
165. Brake step brace incorrectly applied or wrong dimensions. (*C*)

BRAKE SHAFT STIRRUP

166. Brake shaft stirrup bent.
167. Brake shaft stirrup broken.
168. Brake shaft stirrup loose.
169. Brake shaft stirrup missing.
170. Brake shaft stirrup wrong. (*D*)

BRAKE SHAFT SUPPORT

171. Top brake shaft support broken.
172. Top brake shaft support loose.
173. Top brake shaft support missing.
174. Top brake shaft support incorrectly applied.
175. Brake shaft bracket loose.
176. Brake shaft bracket missing.
177. Brake shaft bracket incorrectly applied.

RATCHET BRAKE

(State name of ratchet brake found defective)
178. Ratchet lever bent, broken or with improper clearance. (*C*)

179. Ratchet lever missing.
180. Ratchet pawl broken or missing. (*C*)
181. Ratchet pin or key missing.
182. Ratchet cap missing.
183. Ratchet gear broken.

GEAR BRAKE

(State name of gear brake found defective.)
184. Gear brake defective. (*C*)

BRAKE CHAIN

185. Brake chain disconnected.
186. Brake chain broken.
187. Brake chain missing.
188. Brake chain worn or wrong dimensions. (*C–D*)
189. Brake chain incorrectly secured to shaft.
190. Brake chain incorrectly applied or too long. (*C*)

HAND BRAKE ROD

191. Hand brake rod disconnected, broken or missing. (*C*)
192. Hand brake rod worn or defective. (*C–D*)
193. Hand brake rod too long.
194. Hand brake sheave wheel defective or missing. (*C*)

TOP TRUCK ROD

195. Top truck rod disconnected, broken, or missing. (*C*)
196. Top truck rod worn or defective. (*C–D*)
197. Top truck rod improper length. (*D*)
198.

BOTTOM TRUCK ROD

199. Bottom truck rod disconnected, broken, or missing. (*C*)
200. Bottom truck rod defective. (*C*)
201. Bottom truck rod improper length. (*D*)
202.

CYLINDER ROD

203. Cylinder rod disconnected, broken or missing. (*C*)
204. Cylinder rod defective. (*C*)
205. Cylinder rod improper length. (*D*)
206.
207.
208.
209.

FLOATING LEVER FULCRUM

210.
211. Floating lever fulcrum broken, loose, missing or defective. (*C*)
212.
213.

CYLINDER LEVER

214. Cylinder lever disconnected, broken, bent, or missing. (*C*)
215. Cylinder lever guide defective. (*C*)
216.
217.

FLOATING LEVER

218. Floating lever disconnected, broken, bent, or missing. (*C*)
219. Floating lever guide defective. (*C*)
220.
221.

TRUCK LEVERS

222. Truck live lever disconnected, broken, bent, or missing. (*C*)
223.
224.
225. Truck dead lever disconnected, broken, bent, or missing. (*C*)
226. Truck dead lever defective. (*C*)
227. Truck dead lever fulcrum disconnected, broken, missing, or defective. (*C*)
228
229.

BRAKE BEAM

230. Brake beam safety support defective. (*C*)
231. Brake beam or attachments defective. (*C*)
(Report guide pins missing on outside hung brake beams only.)
232. Brake beam fulcrum defective. (*C*)

BRAKE SHOE

233. Brake shoe missing.
234. Brake shoe broken. (*D*)
235. Brake shoe key missing.

BRAKE HANGER

236. Brake hanger bent. (*D*)
237. Brake hanger broken.
238. Brake hanger missing.
239. Brake hanger wrong. (*C–D*)
240. Brake hanger support defective. (*C–D*)
241. Brake hanger connecting pin missing. (State location.)
242. Brake hanger connecting pin wrong. (State location.)

COTTER KEYS FOR FOUNDATION BRAKE RIGGING

243. Brake hanger pin cotter key missing. (State location.)
244. Floating lever connecting pin cotter key missing.
245. Cylinder lever connecting pin cotter key missing.
246. Dead lever connecting pin cotter key missing.
247. Live lever connecting pin cotter key missing.
248.

HAND BRAKE

249. Hand brake missing.
250. Hand brake inoperative. (*C*)
251. Hand brake inefficient. (*C*)

SILL STEP

252. Sill step bent.
253. Sill step broken.
254. Sill step loose.
255. Sill step missing.
256. Sill step wrong dimensions. (*C*)
257. Sill step incorrectly located or applied. (*C*)

PLATFORM SILL STEP

(Hangers and back stops to be included under following numbers and described in column covering remarks.)

258. Platform sill step bent.
259. Platform sill step broken.
260. Platform sill step loose.
261. Platform sill step missing.
262. Platform sill step wrong dimensions. (*C*)
263. Platform sill step incorrectly applied. (*C*)

SIDE DOOR SILL STEP

264. Side door sill step bent.
265. Side door sill step broken.
266. Side door sill step loose.
267. Side door sill step missing.
268. Side door sill step wrong dimensions. (*C*)
269. Side door sill step incorrectly located or applied. (*C*)

FOOT-BOARD SILL STEP

270. Foot-board sill step bent.
271. Foot-board sill step broken.
272. Foot-board sill step loose.
273. Foot-board sill step missing.
274. Foot-board sill step wrong dimensions. (*C*)
275. Foot-board sill step incorrectly located or applied. (*C*)

PILOT SILL STEP

276. Pilot sill step bent.
277. Pilot sill step broken.

278. Pilot sill step loose.
279. Pilot sill step missing.
280. Pilot sill step wrong dimensions. (*C*)
281. Pilot sill step incorrectly located or applied. (*C*)
282.
283.
284.
285.

STEP FOR HEADLIGHT

286. Step for headlight bent, broken, loose or missing. (*C*)
287. Step for headlight not suitable for use. (*C*)
288.

POWER BRAKE

289. Power driving-wheel brake missing.
290. Power driving-wheel brake defective. (*C*)
291. Locomotive not equipped with appliances for operating train brake systems.

292.
293.
294.
295.
296.
297.
298.
299.

ASH PANS

300. Ash pan defective. (*C*)

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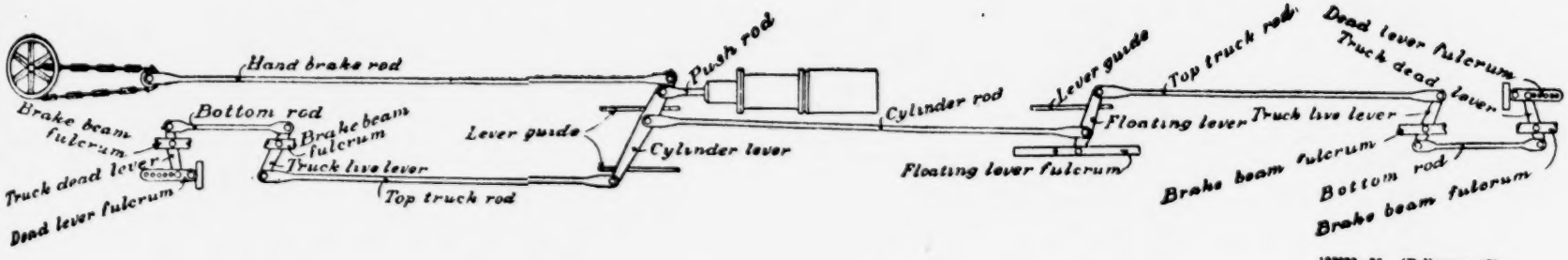

127923—38. (Follows p. 17)

Argument

The Federal decisional law governs each and every one of the issues arising in a suit under the Federal Employers' Liability Act and the Safety Appliance Acts:

Jacobs v. Reading Co., 130 F. 2d 612.

This must necessarily include uniformity in the rules governing the admissibility and effect of the evidence in causes that are governed and controlled by Federal Acts.

(4)

It is difficult to conceive that respondent seriously urges that it was misled by the brevity of the averment of general negligence. That it fully comprehended its purpose and meaning is apparent from the nature of defendant's Answer. The defense of contributory negligence there specifically raised (6a) had no possible reference to any **other** part of the Complaint. **This defense was never withdrawn or stricken.** In addition the defendant was fully aware of its rights under Rule 12(e) of the Federal Rules. Under it defendant could have moved "for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity. . . ." That the averments **were** sufficiently definite and particular is evidenced by defendant's failure to so move, and that they were understood precisely in the light that they were pleaded is unquestionably demonstrated by the defense offered. It must further be stated that full and complete depositions were taken prior to trial so that the **evidence** upon which was based the claim of liability under the Federal Employers' Liability Act was entirely familiar to it.

In our original Brief we have pointed out that there is no pre-trial order limiting the issues at the trial. Certainly the loose language of counsel in discussion cannot now be

construed as a waiver of petitioner's substantive and constitutional rights:

> *Lilly v. Grand Trunk W. R. Co.*, 317 U. S. 481, 489; 63 S. Ct. 347.

Respondent's reliance upon the case of *Louisville & N. R. Co. v. Stewart*, 283 Ky. 585, 142 S. W. 2d 119, is indicative of the weakness of its position. That decision **recognizes** that the duty to provide a safe place to work is not limited to defects in defendant's realty. This duty of the employer extends to the operations of its employees and of its equipment. Had the **Stewart** case been tried under the Federal Rules instead of the hide-bound Kentucky practice, we have no doubt that the conclusion reached must also have been different.

An argument is made that plaintiff's submission of 18 other requests indicated an abandonment of her Request #2. This hardly merits discussion. The Request #2 (343a) completely covered the question involved and the existence of many other requests could not limit or affect the error in refusing to give it.

Respondent's justification of the Court's refusal to charge in accordance with plaintiff's second oral request (341a) is purely captious. The request was not refused by the Trial Judge because of any nice distinctions in the language used. The Court refused to accept the language and the **theory** forming the basis of the request precisely as he had eliminated this theory from the entire charge.

The basic fallacy of respondent's position is clearly demonstrated in its next argument. It analyzes the testimony in the **light most favorable to it,** assuming the truth of patently unbelievable evidence given by its own witness. Petitioner's position here is not that the jury **must** have disbelieved this testimony but that she had a **constitutional right to have it** submitted to the jury in a proper charge. We do conceive that the testimony of the witness, Rihm, was entirely unbelievable in the face of the physical facts and the patent

conclusion that no one else but Barry could have set the brakes on his car. The proximity of the two drafts as they proceeded down the hump (21a, 22a) was sufficient for the jury to find that they had been crowded; Rihm's admission that he violated the rule, custom and practice in not keeping a lookout to the rear (25a, 309a, 312a) was a clear act of negligence. Rihm was an inexperienced or green brakeman (308a). The relative speeds of the cars appears at 311a; the purpose of Rihm's stopping at 315a; the collision at 315a; that Barry's car immediately stopped at 310a; that the car could not physically have gone 8 or even 3 or 4 car lengths is fixed by the position of Barry's body (30a, 31a).

Respondent's discussion of the Coupler Act violation is entirely misleading. The evidence of the violation never appeared in the case until defendant called its **last** witness (308a). No amendment was necessary in order to submit the issue to the jury: Rule 15(b). And it was for the jury to decide whether the failure to stop the car at once by coupling did or did not proximately contribute to Barry's death: *Union Pacific R. Co. v. Huxoll*, 245 U. S. 535, 38 S. Ct. 187.

At page 23 of its brief, respondent contends that the coupler act applies only to those actually engaged in coupling. The law is to the contrary both before and after the **Lang** case which it cites:

> *Phila. etc. R. Co. v. Fessler*, 295 F. 650 (CCA 3), cert. den. 264 U. S. 585; 44 S. Ct. 334;
> *Keenan v. Director Gen.*, 285 F. 286 (CCA 2), cert. den. 261 U. S. 616, 43 S. Ct. 361.

Respondent's argument that the cause was in fact submitted to the jury under the Federal Employers' Liability Act is pure "shadow-boxing." Any fair reading of the charge will indicate that the Act was cited by the Trial Judge for jurisdictional purposes only and that nowhere did he indicate that plaintiff was entitled to relief thereunder independent of her rights under the Safety Appliance

Acts. Every direction in the charge was centered upon the alleged violations of the brake Act and even the right of recovery on this issue was effectually eliminated by the Court's erroneous construction of the Act and its erroneous charge as hereinbefore indicated. To quote the Act but fail to charge that recovery may be based upon it in whole or in part can hardly be construed to be a submission to the jury of "the right of the plaintiff to recover under the Federal Employers' Liability Act." Your Honorable Court very recently declared in

> *Blair v. Baltimore & O. R. Co.*, 65 S. Ct. 545, 546: "To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

And again at page 547:

> "The negligence of the employer may be determined by viewing its conduct as a whole. . . . And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and when each imparts character to the others."

(5)

Respondent's argument on this point entirely ignores the language of the charge. At no time during the charge was the jury told that they were permitted to draw reasonable and justifiable inferences from the evidence **in order to determine whether or not the accident occurred by reason of the defendant's negligence.** The jury's right to consider **even the circumstances** was limited by the charge to a prior finding of a defect or inefficiency in the brake (339a):

"Now, if you find that there was a defect in this brake, or it was an inefficient brake, you may take all of the circumstances. . . ."

The jurors were thus told by the Court that they could not consider the circumstances unless they found a defect, language which effectually prevented them from finding **from the circumstances** that the brake was inefficient, despite the plaintiff's specific request, at the conclusion of the Court's charge, that the jury be told that if they found any part of the brake or its appurtenances inefficient, or if the brake as a whole, in its entirety, failed to function when called upon to so function in the ordinary and usual manner, that under those circumstances it would be sufficient to afford the plaintiff the right of recovery in this case. This request was denied and exception granted.

In addition to this glaring error, the trial judge specifically refused to charge the jury as to the inferences that might be drawn in favor of the plaintiff by reason of the death of the decedent (340a, 341a). He conceived the rule to be that the inference (or presumption as it is frequently called) is of moment only in considering the question of the contributory negligence of a decedent.

In the leading case of *Worthington v. Elmer,* 207 Fed. 306, a brakeman was last seen on a car upon which it was his duty to set the brakes. His car collided with another car and he was killed. The nearest brake on the next car was found to be defective. The court there said (308, 309):

"From the facts just pointed out and the most natural and reasonable inference deducible therefrom, it was entirely justifiable to conclude that Rice continued in the performance of his duty respecting the brake on the box car between the time he was seen setting the opposite brake and the collision. As was said in Maguire v. Fitchburg Railroad, 146 Mass. 379, 15 N. E. 904, respecting the evidential effect of finding a deceased

employee's body at a place where his duty had called him:

> "'The jury might well have believed that he was on the track in the performance of his duty and in the exercise of all the care to be expected of a prudent man.' . . .
>
> "This is in principle like the presumption of performance of duty, which, in the absence of evidence to the contrary, is indulged in favor of one who is injured at a railroad crossing; that is, that he stopped, looked and listened before attempting to cross. Baltimore & Potomac R. R. v. Landrigan, 191 U. S. 461, 472, 474, 24 Sup. Ct. 137, 38 L. Ed. 262; P., C., C. & St. L. Ry. Co. v. Scherer, 205 Fed. 356, decided by this court May 6, 1913; Gates v. Beebe, 170 Mich. 107, 112, 135 N. W. 934. The principle so alluded to is applicable under other and varying circumstances, where there is an absence, as here, of direct testimony on the subject in dispute."

In the case of *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, Mr. Justice Murphy said:

> "The absence of eye witnesses was not decisive. There was testimony that his duties included staying near the north or rear end of the engine as it made its backward movement out of track B-28. The location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began this backward movement and where he might have been located in the performance of his duties. **To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death.** Looney v. Metropolitan R. Co., 200 U. S. 480, 488, 26 S. Ct. 303, 306, 50 L. Ed. 564; Atchinson, Topeka & Santa Fe R. Co. v. Toops, supra, 281 U. S. 356, 50 S. Ct.

283, 74 L. Ed. 896; New Aetna Portland Cement Co. v. Hatt, 6 Cir., 231 F. 611, 617."

"His activities, we have a right to assume, centered around the successful completion of his undertaking:"

Chicago, St. P. M. & O. Ry. Co. v. Muldowney, 130 F. 2d 971, 975 (cert. den. 317 U. S. 700, 63 S. Ct. 526).

In a case such as this, depending as it must entirely upon circumstantial evidence, the completely erroneous impression left upon the minds of the jury by such instructions without qualification must be apparent. **Taking the language of the Court and applying it to this record, it constituted a direction to the jury to find for the defendant.** As the Judge stated, no one saw Barry leave the brake step. There was direct evidence that the brake and the step were defective, but there were also circumstances from which the jury may have concluded that whether defective or not, it failed to operate efficiently and stop the car. What caused Barry to fall was a matter solely for inference. As in all circumstantial evidence cases, the inferences reasonably to be drawn from all the evidence could have proved the plaintiff's case. To eliminate and exclude the right of the jury to draw such inferences would be to say that no recovery could be had in any case in which an eye-witness could not be produced to describe all of the operative facts.

Cases resting on circumstantial evidence much less persuasive than the case at bar, have been held to be for the jury under proper instructions:

Baily v. Central Vt. Ry., Inc., 319 U. S. 350, 63 S. Ct. 1062;

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29; 64 S. Ct. Rep. 409;

Louisville & N. Ry. Co. v. Summerlin, 18 F. 2d. 950;

St. Louis-S. F. Ry. Co. v. Bishop, 33 S. W. 2d. 383, 182 Ark. 763 (cert. den. 283 U. S. 854, 51 S. Ct. 647);

Ft. Smith & W. R. Co. v. Knott, 159 P. 847, 60 Okl. 175;
Kelly v. Union Pac. Ry. Co., 125 S. W. 818, 141 Mo. App. 490.

Respectfully submitted,

MILFORD J. MEYER,
Counsel for Petitioner.

SAMUEL SHAPIRO,
HARRY G. FUERST,
Of Counsel.

FILED
APR 18 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 929. October Term, 1944.

PAULINE E. BARRY, Administratrix of the ESTATE OF RALPH E. BARRY, Deceased,
Petitioner,

vs.

READING COMPANY,
Respondent.

PETITION FOR REHEARING OR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now, Pauline E. Barry, Administratrix of the Estate of Ralph E. Barry, Deceased, and respectfully petitions this Honorable Court for a rehearing and reconsideration of her petition for a writ of certiorari to review the opinions and judgment of the United States Circuit Court of Appeals for the Third Circuit, her said petition having been denied by this Honorable Court on April 2, 1945, for the following reasons:

1. Your petitioner in this cause has been denied the fundamental and constitutional right to have presented to and passed upon by a jury her claim that the general negligence of the defendant-respondent contributed to the death of her decedent and was therefore cognizable under the Federal Employers' Liability Acts.

2. In addition to the defendant's violations of the Safety Appliance Act and regulations promulgated thereunder, the evidence presented proved general negligence of defendant's employees in violating the custom and practice to keep a lookout and in cutting two drafts of cars in too close proximity to each other.

3. The trial court refused to permit the jury to consider this evidence as an independent basis for recovery even after a specific request was made at the end of the charge, while the jury was still in the box. The trial judge, having destroyed petitioner's right of recovery under the Safety Appliance Act by admitting inadmissible testimony, manifestly charged the petitioner out of Court by refusing to permit the jury to consider the issue of general negligence under the Federal Employers' Liability Acts.

4. The Circuit Court of Appeals completely ignored this error when it entered its first judgment, and limited the rehearing subsequently granted to a consideration of the question raised relating to the construction of the Safety Appliance Act.

5. Your petitioner, the widow of this decedent, and her child, have had no opportunity allowed or granted them in any court to litigate this issue, a right which she believes to belong to her constitutionally and fundamentally under the law.

Wherefore your petitioner respectfully prays that this Honorable Court grant a rehearing or reconsider her petition for a writ of certiorari in this cause.

Respectfully submitted,

MILFORD J. MEYER,
Counsel for Petitioner.

SAMUEL SHAPIRO,
HARRY G. FUERST,
Of Counsel.